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No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1970

ALEX SCHOLDER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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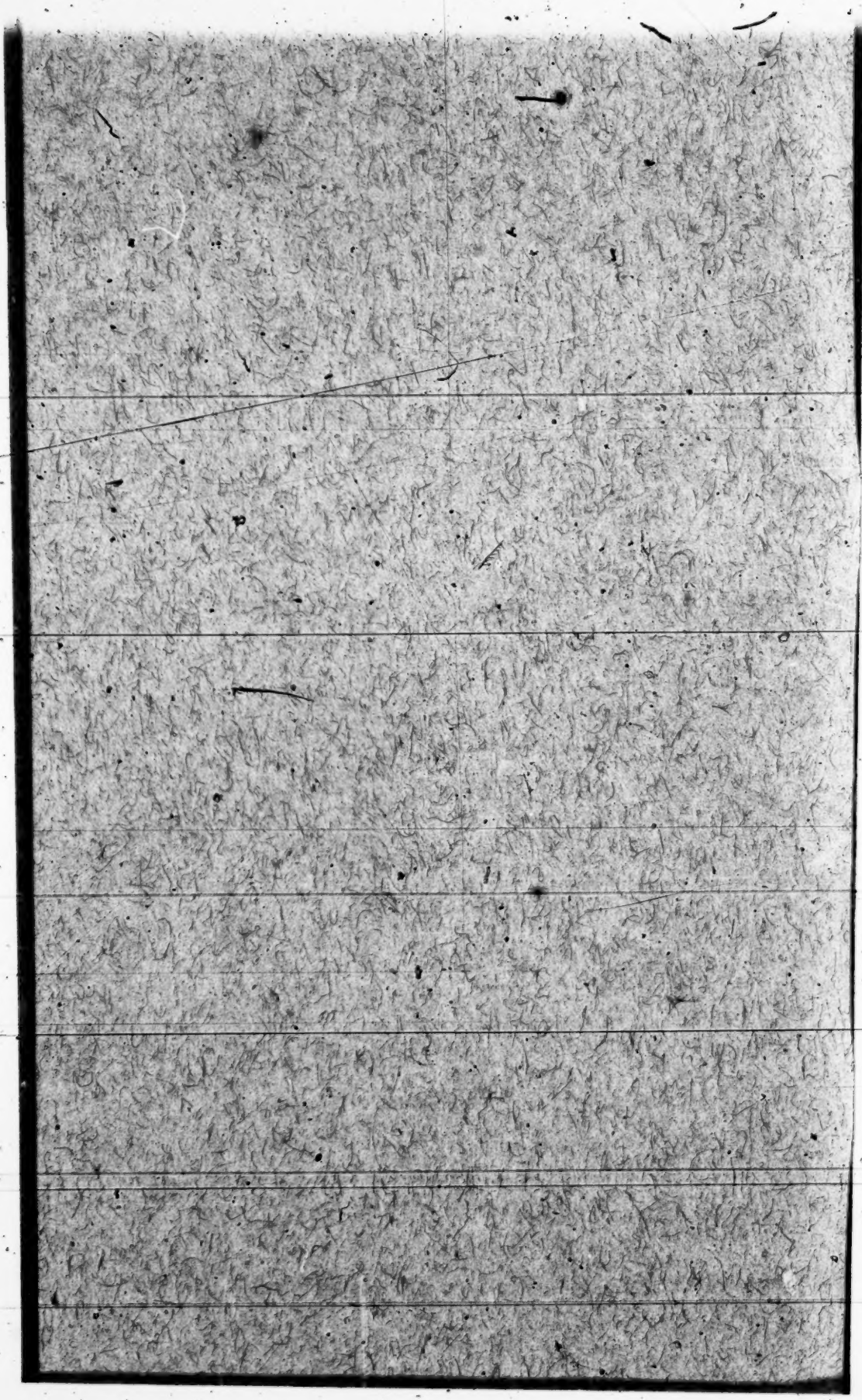

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OPINIONS BELOW

The opinion of the Solicitor, Department of the Interior (App. A, *infra*, pp. 9–12), is not reported. The opinion of the district court (Pet. App. C) is reported at 298 F. Supp. 1282. The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1970. A timely petition for rehearing was denied on July 21, 1970. The petition for a writ of certiorari was filed on September 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

407-048—70—1

QUESTIONS PRESENTED

1. Whether the expenditure in this case of federal funds for the irrigation of lands owned by a non-Indian within an Indian irrigation project on a reservation was authorized.

2. Whether the district court lacked jurisdiction to grant specific relief against the United States, the Department of the Interior, the Bureau of Indian Affairs, and named federal officials, enjoining the expenditure.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in Appendix B, *infra*, pp. 13–17.

STATEMENT

Alex Scholder, an Indian allottee, as representative of a class, and the Pala and Rincon Bands of Mission Indians brought this suit to enjoin use of funds appropriated by Congress for Indian irrigation systems for construction of a pipeline which would allegedly benefit only lands owned by a non-Indian, Willard Allers. The apportionment of construction costs (totaling approximately $800) to all lands within the system, including Indians lands, was also challenged.[1] At issue were 1965 and 1966 appropriation statutes (App., *infra*, pp. 16–17) which, *inter alia*, appropriated $40,000 "For construction, major repair, and improvement of irrigation and power systems * * *." The United States, the Secretary and the Department of

[1] These costs cannot be collected so long as title remains in Indians. See 25 U.S.C. 386a.

the Interior, the Bureau of Indian Affairs, and certain officials of the Bureau were named as defendants. Allers was not joined. After hearing, and on cross-motions for summary judgment, the district court dismissed Scholder's claims for lack of jurisdiction, and granted summary judgment against the Pala and Rincon Bands.

The court of appeals affirmed, holding that sovereign immunity barred the claims against the United States, since 28 U.S.C. 1331, 1361, and 1362, and 25 U.S.C. 345, the only statutes relied upon by petitioners, did not constitute consent by the United States to suits of this type. The court also ruled that the action could not be maintained against the Department of the Interior or the Bureau of Indian Affairs, and approved dismissal of the suit against the officials on the ground that they had acted within their delegated statutory authority and not pursuant to an unconstitutional statute. However, since 25 U.S.C. 345 (App. *infra*, p. 14) protects Indian allotment rights and supplies limited consent to suit, the court remanded to the district court the issue whether apportionment of construction costs among all lands within the irrigation project was proper. Finally, the court observed that, although Allers' was the only request made after the appropriations, Indians had asked for irrigation in prior years when no funds were available and the Bureau's failure to treat those requests as still "pending" was deplorable, although insulated from judicial scrutiny.

Petitioners sought rehearing but this was denied without opinion.

ARGUMENT

Aside from the contention with respect to the Administrative Procedure Act, discussed *infra* (pp. 5–6), the only question presented is whether the Department of the Interior was authorized to expend funds for a pipeline in an Indian irrigation project for a non-Indian. The authorization is plain. Congress long ago recognized that some lands within Indian irrigation systems were owned by non-Indians and intended to place Indian and non-Indian owners on equal footing. See 25 U.S.C. 389 (App. *infra*, p. 15); S. Rep. No. 1715, 74th Cong., 2d Sess., p. 2. Moreover, Congress was apprised in the budget requests that the appropriations in question would be used in part for non-Indian landowners.[2] And, as the Solicitor of Interior commented (App. *infra*, p. 11):

> This contention [that such funds may be expended only for the benefit of Indian owners of land] ignores over half a century of legislative and administrative activity and the essential nature of an irrigation project.

The court of appeals agreed (Pet. App. B 5):

> Indian irrigation projects have been sponsored

[2] Hearings, Senate Subcommittee of the Committee on Appropriations, H.R. 6767, 89th Cong., 1st Sess., p. 685; Hearings, House Subcommittee of the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1966, 89th Cong., 1st Sess., p. 867; Hearings, Senate Subcommittee of the Committee on Appropriations, H.R. 10433, 88th Cong., 2d Sess., p. 181; Hearings, House Subcommittee of the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations for 1965, 88th Cong., 2d Sess., p. 861.

> and administered by the United States for over 80 years, and at all times the projects have served non-Indians as well as Indian lands within their boundaries. * * *[3]

This congressional and executive understanding and practice over a substantial period of time should be upheld in construing the applicable statutes. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16–18; *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293–294; *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 735–736.

Since the federal officials here acted within their statutory authority and not pursuant to an unconstitutional statute, the suit to enjoin them was properly dismissed for lack of jurisdiction. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609.

2. Petitioners contend that the Administrative Procedure Act, 5 U.S.C. (Supp. V) 701 *et seq.*, is a limited waiver of immunity and that the court of appeals erred in not so holding. But this contention was neither pre-

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[3] Both courts below also recognized that an expenditure for a non-Indian may benefit Indians by improving the general system: "The Allers expenditure extends and improves the Pala project * * *," which, "viewed as a whole, is operated for the benefit and assistance of Indians," and "speculation is often required in determining who benefits from a particular expenditure." The courts, therefore, properly declined "the unenviable task of reviewing individual Bureau expenditures and speculating in each instance about potential beneficiaries." (Pet. App. B 7–8, and note 11; Pet. App. C 11.)

[4] Petitioners also charge that the administrative practice—of not treating past Indian requests as "alive" until funds are appropriated and then acting on them—is "arbitrary and

sented to, nor passed on by, either court below. The Administrative Procedure Act was not mentioned in either petitioners' brief or their reply brief in the court of appeals; petitioners' entire argument on this point was that the officers of the Bureau had acted beyond their statutory authority. That Act was first cited on appeal by petitioners only in the petition for rehearing, which the court of appeals properly denied without opinion.

Thus, in view of the posture of petitioners' claim and the fact that this is not a suit to challenge administrative rejection of Indian requests for irrigation improvements, this case is inappropriate for resolving the issue posed by the Administrative Procedure Act.

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capricious." But it was inappropriate to attempt to correct that practice by suing to enjoin an authorized expenditure for a non-Indian.

Contrast *Washington* v. *Udall*, 417 F. 2d 1310, 1319–1321 (C.A. 9), and cases cited there and in the dissenting opinion, *id.* at 1323 n. 1.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[6]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
S. BILLINGSLEY HILL,
RAYMOND N. ZAGONE,
Attorneys.

OCTOBER 1970.

[6] In light of the court of appeals' criticism of the government's administration of this irrigation project, we have inquired about post-record developments (all of which are matters of public information). We are informed by the Department of the Interior that since Allers' request in 1967, there have been three requests by Indians for irrigation service in this project. Each of these requests was granted and a total of nearly $3200 for construction costs was expended. In addition, in the fiscal years since 1967, more than $37,000 in operation and maintenance funds has been spent on the Pala Indian Irrigation Project.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C. 20240, August 23, 1968.

Memorandum to: Commissioner, Bureau of Indian Affairs

From: Solicitor

Subject: Authority to construct or rehabilitate irrigation facilities serving non-Indians on Indian reservations.

Your memorandum of July 18, 1968, asks whether funds of the United States appropriated by Congress for the construction, repair and improvement of Indian irrigation systems (see e.g., Interior Appropriation Act for fiscal year 1968, 81 Stat. 59, 61) may be used to construct a lateral to serve non-Indian land within an Indian irrigation project.

The question is raised in connection with plans of the Bureau of Indian Affairs to install a pipeline from a canal to serve originally allotted land within the Pala irrigation project on the Pala Indian Reservation, California, which land was purchased in 1966 by a non-Indian. The purchase price included the payment of $1,280.47 of accrued irrigation costs, and the purchaser executed a contract on Form 5-462b whereby he agreed to pay future irrigation charges assessed against the land. 25 CFR 121.21 and 128.1.

A pipeline which formerly served the land has become inoperable by reason of disuse. The purchaser

407 048—70 — 2

has requested delivery of water to the land, and the Bureau plans to install approximately 900 feet of pipe which, by extension, could also be used to serve adjoining Indian-owned land in the project. The cost of installing the pipe would be treated as a reimbursable cost of the project and allocated on a per acre basis against all land therein. 25 U.S.C. 385 and 386; 25 CFR, Part 211.

A representative of California Rural Legal Assistance has challenged the Bureau's plans on the ground that it is not legally permissible to use appropriated funds for this purpose. He also complains that the Bureau is requiring Indian owners of trust land within the Pala project to pay outstanding construction charges allocated to their land before it permits them to benefit from the expenditure of funds appropriated for the project.

The latter complaint must be based upon a misunderstanding. Section 386a of Title 25 of the United States Code provides in part:

> * * * the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred, and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished. * * *

Under this provision the assessment of costs of construction allocated to Indian-owned land within the project is deferred. No attempt is made to collect such costs from the Indian owners of trust land within the project, and such owners are entitled to participate, equally with other owners of land in the project, in benefits resulting from the expenditure of appropriated funds.

The gravamen of the challenge to the Bureau's authority to use appropriated funds for the purpose proposed is that such funds can be expended only for the direct benefit of Indian owners of land within a project and not for the benefit of non-Indians. This contention ignores over half a century of legislative and administrative activity and the essential nature of an irrigation project.

Generally, an irrigation project is designed to serve an aggregation of land physically suitable for irrigation and proximate to a water supply which can be applied to it by the construction of feasible carriage and distribution facilities. Essentially it is land which is the subject of an irrigation project and not the people who own it from time to time.

While it is undoubtedly true that so-called Indian irrigation projects were originally conceived and authorized primarily for the benefit of Indians, it has always been recognized that non-Indian land might be included within them. It was well known by Congress at the turn of the century when it began to address comprehensively the objective of applying water to lands in the arid West, and to authorize so-called Indian irrigation projects, among other reclamation projects, that a considerable amount of irrigable land within Indian reservations which would be included in such projects had already passed out of Indian ownership.

In sum, although intended primarily for the benefit of Indian-owned land, it always has been contemplated that land owned by non-Indians would be included in and benefited by so-called Indian irrigation projects. Not only has Congress authorized and appropriated funds for such projects with full understanding of this, it also has made provisions to adjust,

defer and cancel reimbursable charges assessed against land within such projects owned by non-Indians similar to those it has made for Indian lands. Compare: 25 U.S.C. 389–389e with 25 U.S.C. 386a.

As a practical matter, an irrigation project must be administered with regard to the entirety of the land included therein, regardless of the personal status from time to time of the several owners thereof. Ultimately the practice of the kind of discrimination against non-Indian owners for which California Rural Legal Assistance contends, would detriment the Indian owners of land within a project by diminishing its market value. A prospective non-Indian purchaser of such land would discount its value to accommodate the fact that it would receive less favored treatment under the project in his hands.

Legally there is no substance to the suggestion that Federal funds appropriated by Congress to the Bureau of Indian Affairs for the construction, repair and improvement of irrigation systems cannot be used to benefit land owned by non-Indians included within irrigation projects administered by that Bureau. We assume that the funds available for expenditure on the Pala project are rather limited. We, of course, express no opinion as to whether the construction plans formulated by the Bureau for the project represent a judicious assignment of priorities for the employment of those funds.

RICHMOND F. ALLAN,
Deputy Solicitor.

Copy to:
Secretary Anderson
Mr. Officer, Asst. to Secretary.

APPENDIX B

STATUTES INVOLVED

The relevant provision of 28 U.S.C. 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. (Supp. V) 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The pertinent provision of the Act of November 2, 1921, 42 Stat. 208, 25 U.S.C. 13, provides:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> * * * * *
>
> For extension, improvement, operation, and maintenance, of existing Indian irrigation systems and for development of water supplies.

Section 1 of the Act of August 15, 1894, 28 Stat. 286, 305, as amended, 25 U.S.C. 345, provides:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

The Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. 386a, provides:

> The Secretary of the Interior is hereby authorized and directed to adjust or eliminate reimbursable charges of the Government of the United States existing as debts against individual Indians or tribes of Indians in such a way

as shall be equitable and just in consideration of all the circumstances under which such charges were made: *Provided*, That the collection of all construction costs against any Indian-owned lands within any Government irrigation project is hereby deferred; and no assessments shall be made on behalf of such charges against such lands until the Indian title thereto shall have been extinguished, and any construction assessments heretofore levied against such lands in accordance with the provisions of section 386 of this title, and uncollected, are hereby canceled: *Provided further*, That a report shall be made to Congress annually, on the first Monday in December, showing adjustments so made during the preceding fiscal year: *Provided further*, That any proceedings hereunder shall not be effective until approved by Congress unless Congress shall have failed to act favorably or unfavorably thereon by concurrent resolution within sixty legislative days after the filing of said report, in which case they shall become effective at the termination of the said sixty legislative days.

Section 1 of the Act of June 22, 1936, 49 Stat. 1803, 25 U.S.C. 389, provides:

The Secretary of the Interior is authorized and directed to cause an investigation to be made to determine whether the owners of non-Indian lands under Indian irrigation projects and under projects where the United States has purchased water rights for Indians are unable to pay irrigation charges, including construction, maintenance, and operating charges, because of inability to operate such lands profitably by reason of lack of fertility of the soil, inadequacy of water supply, defects of irrigation works, or for any other causes. Where the Secretary finds that said landowners are unable to make payment due to the existence of such causes, he may adjust, defer, or cancel

such charges, in whole or in part, as the facts and conditions warrant. In adjusting or deferring any such charges the Secretary may enter into contracts with said landowners for the payment of past due charges, but such contracts shall not extend the payment of such charges over a period in excess of ten years.

The relevant provision of the Act of July 7, 1964, Pub. L. 88–356, 78 Stat. 273–275, provides:

TITLE I—DEPARTMENT OF THE INTERIOR PUBLIC LAND MANAGEMENT

* * * * *

BUREAU OF INDIAN AFFAIRS

* * * * *

CONSTRUCTION

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract; $52,009,000, to remain available until expended: *Provided*, That no part of the sum herein appropriated shall be used for the acquisition of land within the States of Arizona, California, Colorado, New Mexico, South Dakota, Utah, and Wyoming outside of the boundaries of existing Indian reservations: *Provided further*, That no part of this appropriation shall be used for the acquisition of land or water rights within the States of Nevada, Oregon, and Washington either inside or outside the boundaries of existing reservations: *Provided further*, That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation.

The relevant provision of the Act of June 28, 1965, Pub. L. 89–52, 79 Stat. 174–176, provides:

TITLE I—DEPARTMENT OF THE INTERIOR, PUBLIC LAND MANAGEMENT

* * * * *

BUREAU OF INDIAN AFFAIRS

* * * * *

CONSTRUCTION

For construction, major repair, and improvement of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering services by contract: $34,513,000, to remain available until expended: *Provided*, That no part of the sum herein appropriated shall be used for the acquisition of land within the States of Arizona, California, Colorado, New Mexico, South Dakota, and Utah outside of the boundaries of existing Indian reservations except lands authorized by law to be acquired for the Navajo Indian Irrigation Project: *Provided further*, That no part of this appropriation shall be used for the acquisition of land or water rights within the States of Nevada, Oregon, and Washington either inside or outside the boundaries of existing reservations: *Provided further*, That such amounts as may be available for the construction of the Navajo Indian Irrigation Project may be transferred to the Bureau of Reclamation: *Provided further*, That not to exceed $558,000 shall be for assistance to the Dunseith, North Dakota, Public School District No. 1, for construction of an addition to the Dunseith Public School.

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